STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Smolenski, P.J., Zahra and Collins, J.J.

SILVER CREEK DRAIN DISTRICT,

Plaintiff-Appellant, Supreme Court No. 119721

v

EXTRUSIONS DIVISION, INC., Court of Appeals No. 216182

Defendant-Appellee. Kent County Circuit Court
No. 94-002550-CC

AZZAR STORE EQUIPMENT

Defendant.

MICHIGAN DEPARTMENT OF TRANSPORTATION'S AMICUS CURIAE BRIEF

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QUESTION PRESENTED FOR REVIEW

In establishing just compensation in a condemnation case, the trial court found that the need to clean up contaminated property reduced its fair market value. Specific findings of fact were made on the valuation, and just compensation was awarded. Without reversing those findings, the Court of Appeals reversed the award, ruling that, as a matter of law, environmental contamination and cleanup costs may not be considered in determining just compensation. Was that ruling erroneous?

INTRODUCTION

The Court of Appeals answered "no" to the following question, which it posed as an issue of first impression:

> Can environmental contamination and cleanup costs be considered in determining just compensation in a condemnation action?

[*Silver Creek Drain District v Extrusions Division, Inc*, 245 Mich App 556, 562; 630 NW2d 347 (2001)]

This amicus curiae brief is filed because the decision of the Court of Appeals is clearly erroneous and could have serious financial consequences for any state or local public agency that condemns contaminated property for public purposes.

The ruling of the Court of Appeals confused (1) considering the effect of contamination on the market value of property, and (2) recovering environmental remediation costs. This confusion of concepts, and the particular circumstances of this case, appear to have led the Court to its erroneous legal conclusion.

Determining the owner's liability for clean up costs is not the purpose of condemnation; it is not a relevant issue. But, taking contamination into account to determine fair market value is as proper as considering the uses for which a parcel of property is zoned.

The language of the Court of Appeals – given the quoted nature of the case under review – purports to bar <u>any</u> consideration of contamination or clean up costs in a condemnation case. Public agencies are to pay a "fair market value" for contaminated property that is based upon the false assumption that the property is not contaminated. That view is in direct conflict with settled principles of eminent domain law and the language of the Uniform Condemnation Procedures Act (UPCA). If that view is allowed

to become the law of this state, owners of contaminated property will be enriched by windfall payments, while the public will be burdened by paying twice for the same thing: (1) an unjustified premium due to contaminated property being valued as if it were free of contamination; and (2) the cost to clean up the property to remove the contamination. The suggestion that the public agency could separately recover the cleanup costs from the condemnee ignores the fact that the condemnee may not be liable for those costs under the environmental laws, and no other collectible responsible party may be in existence. Even if some third party could be held liable for the cleanup costs, that would not justify paying a windfall to the non-liable condemnee.

The Court of Appeals ruled that it was bound by the terms of the UCPA to rule as it did. But the UCPA contains language that can only be read to allow consideration of contamination, insofar as it affects the fair market value of the property being condemned. The Court did not cite or discuss that language.

This amicus curiae brief will show how the Court of Appeals confused distinct legal concepts and based upon that confusion ignored the factual findings of the trial court and the language of the UCPA to deliver a clearly erroneous decision.

This amicus curiae brief will not address issues "B" and "C" of the Court's opinion.

STATEMENT OF PROCEEDINGS AND FACTS

This statement is based on the May 4, 2001 opinion issued by the Court of Appeals reversing an award of just compensation in a condemnation case. A Motion for Rehearing was denied by Order of June 26, 2001.

Silver Creek Drain District (Drain District) determined that certain property, known as Old South Field, owned by Extrusions Division, Inc. (Extrusions) was needed for construction of a storm water detention pond. A good faith offer was made to purchase the property. The Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* requires that a good faith offer expressly waive or reserve the right of the agency to bring a federal or state cost recovery action against the owner for environmental remediation costs [MCL 213.55]. It was stipulated that the property had been contaminated by a prior owner's release of hazardous substances. The District's good faith offer of $211,300 reserved its right to bring a cost recovery action against the Owner. [245 Mich App at 558-559].

The Drain District estimated the costs of necessary remediation to be $467,000 and asked the trial court to place the amount of the offer, $211,300, in escrow as security for remediation costs, as provided in MCL 213.58. Extrusions opposed the escrow and the parties then agreed, and the court ordered, that the $211,300 would be paid to Extrusions [245 Mich App at 559-560].

A bench trial was conducted during which the effect of the contamination on the fair market value of Old South Field was considered. The Court of Appeals summarized the trial court's findings on that effect:

> On November 6, 1997, the trial court issued an opinion, finding that the value of Old South Field at the time of the taking, without consideration of environmental cleanup costs, was $278,800. The court then found:
>
> > At the time of the taking, Old South Field was an environmentally contaminated site, with respect to which a reasonably prudent purchaser would have required, at a minimum, a formal Type-C Closure from the DNR as a condition precedent to closing.
>
> The court determined that the reasonable cost of securing such a formal Type-C clearance was $237,768. Subtracting that amount from the value of the property without consideration of environmental cleanup costs, the court arrived at the sum of $41,032, which it concluded was the net fair market value of the property and constituted just compensation on the date of the taking. [245 Mich App at 560-561]

For some unexplained reason the trial court ruled that Extrusions could keep the $211,300 plus interest, even though it was only entitled to $41,032 in just compensation. [245 Mich App at 561]. The Drain District did not appeal that ruling.

The first issue contested by Extrusions on appeal was "whether the trial court properly considered environmental contamination and potential cleanup costs when determining just compensation." [245 Mich App at 562, n 7]. Extrusions also contested the dollar amount of the award and the trial court's failure to award damages allegedly suffered by Extrusions' remaining property [245 Mich App at 561-562].

On the first issue, the Court ruled that contamination may not be considered in determining fair market value of property in condemnation proceedings. The Court stated that its "conclusion is premised on the plain language of the Amendments to the UCPA," so that: "any form of cost recovery arising from environmental contamination is to be pursued in a separate cause of action." [245 Mich App at 565].

This amicus curiae brief is addressed solely to the ruling by the Court of Appeals on the first issue.

ARGUMENT

I. In establishing just compensation in a condemnation case, the trial court found that the need to clean up contaminated property reduced its fair market value. Specific findings of fact were made on the valuation, and just compensation was awarded. Without reversing those findings, the Court of Appeals reversed the award, ruling that, as a matter of law, environmental contamination and cleanup costs may not be considered in determining just compensation. That ruling was erroneous.

A. Standard of Review

The Court of Appeals based its decision on an interpretation of the Uniform Condemnation Procedures Act. Interpreting a statute and applying the legal principles that govern the determination of just compensation present questions of law. This Court reviews questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

B. Preservation of the Question

Whether environmental contamination and cleanup costs may be considered in determining just compensation was raised, briefed by the parties, and decided by the Court of Appeals.

C. The Court of Appeals failed to properly review the factual findings.

The trial court received the evidence and found that the existence of contamination reduced the value of the property from what it would be, were it not contaminated. The court found as a matter of fact that: "a reasonably prudent purchaser would have required, at a minimum, a formal Type-C Closure from the DNR as a condition precedent to closing." [245 Mich App at 561] Consistent with that finding, the trial court found, as a matter of fact, that the fair market value of the property is what it

would be worth uncontaminated, less the costs of achieving a Type-C Closure.[1] [245 Mich App at 561]

The Court of Appeals did not address whether those factual findings were, or were not, supported by the evidence. The Court of Appeals did, however, dispute the relevance of contamination to fair market value and disputed the validity of deducting cleanup costs to arrive at fair market value:

> The mere fact that a property is contaminated provides no significant assistance in determining its fair market value.
>
> * * *
>
> Determining fair market value of a contaminated property is not as simple as deducting the estimated costs of remediation. [245 Mich App at 567]

Whether contamination affects market value, and how the contamination is to be taken into account, present questions of fact to be addressed by the evidence and factual findings. But the Court of Appeals did not address the evidentiary record, or otherwise find an absence of credible evidentiary support for the trial court's findings of fact. The Court of Appeals is not free to draw its own factual conclusions, in disregard of those of the trial court. A trial court's findings of fact may not be reversed unless they are clearly erroneous. *DiFranco v Pickard*, 427 Mich 32, 58-59; 398 NW2d 896 (1986). The Court of Appeals erred by basing its decision, in part, on assertions of fact that were in conflict with the findings of fact made by the trial court, without first determining that the trial court's findings were clearly erroneous.

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[1] The use and development of property with a Type-C Closure is severely restricted. The notion that its value is equivalent to that of uncontaminated property seems dubious. But the evidentiary record is controlling for purposes of this case and that issue is beyond the scope of this amicus curiae brief.

D. Cost recovery should be distinguished from determining just compensation.

The Court of Appeals was entirely correct when it stated that: "The UCPA does not provide a basis for recovering remediation costs" and "An agency must bring a separate cause of action under state or federal law to establish liability for remediation costs." [245 Mich App at 565-566] But those statements have no bearing on whether the existence of contamination may be considered in determining fair market value. Nor do they have any bearing on the correctness of the decisions actually made by the trial court.

The Court of Appeals commingled two distinct concepts: (1) taking the existence of contamination into account when determining the fair market value of property to award just compensation in a condemnation case; and (2) assessing liability and awarding damages or restitution, for costs incurred for the environmental remediation of property:

> An agency must bring a separate cause of action under state or federal law to establish liability for remediation costs. By deducting estimated cleanup costs from a parcel's value in determining just compensation for a taking, a court circumvents any defense a landowner might have to liability for such costs. [245 Mich App at 565-566]
>
> Thus, it is clear that the only proper method of arriving at just compensation is to separate the question of just compensation from the question of liability for environmental cleanup.[12]
>
> * * *

[12]There is a split of authority among courts from other states that have addressed this question. Some courts have concluded that evidence of contamination should not be considered in just compensation proceedings....Other courts have concluded that evidence of contamination is relevant to market value in eminent domain proceedings....[245 Mich App at 568; (citations omitted)].

A condemnation case is an *in rem* proceeding; it is instituted to determine the value of property, not to assign liability or award any damages against the property owners. The value of the property should be unaffected by whether the owner would

have, or would not have, defenses to liability in a separate cost recovery action. (If, for some reason, liability happens to be relevant to value in a particular case, that can be addressed by the evidence and evaluated by the fact-finder.)

The estimated costs of remediation are only relevant insofar as they may pertain to the fair market value of the property. The proceedings are governed by the UCPA.

An action to recover environmental remediation costs is an *in personam* proceeding, instituted to assign liability and to allocate responsibility among the defendants for cleanup costs, in accordance with relevant principles of environmental law. The proceedings are typically brought under Part 201 of the Michigan Natural Resources and Environmental Protection Act, MCL §§ 324.20201, *et seq.* (NREPA) or the Comprehensive Environmental Response Compensation and Liability Act, 42 USC §§ 9601 *et seq.* (CERCLA). The value of the property is not at issue and the UCPA does not govern the proceedings. While in a condemnation case only the public agency and the "owner"[2] are parties, in a cost recovery action the parties may also include prior owners, lessees, adjacent property owners and various other third-parties who may be legally accountable for the costs of remediation. The damages or restitution awarded in a cost recovery action may far exceed the fair market value of the property.

The only connection that a condemnation case has to a cost recovery case is that an escrow may be created in a condemnation case to provide security for an agency that

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[2]Section 1(f) of the UCPA, MCL 213.51, defines "owner":

Sec. 1. As used in this act:
(f) "Owner" means a person, fiduciary, partnership, association, corporation, or a governmental unit or agency having an estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned.

intends to seek cost recovery from the owner in a separate lawsuit. Section 8 of the UCPA sets forth the standards for creating and administering such an escrow.[3]

E. If contamination affects value, it may be considered.

Just compensation is based on the fair market value of property in light of the highest and best use of that property. In *Wayne County Board of Road Commissioners v GLS Leasco,* 394 Mich 126, 141-142; 229 NW2d 797 (1975) the Court explained this notion:

> [I]n determining the fair market value the jury should consider any and all uses to which the property has been devoted or may reasonably be adapted. The jury

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[3] Section 8 of the UCPA, MCL 213.58, provides in pertinent part:

(2) If the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited under section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel. An agency shall present an affidavit and environmental report establishing that the funds placed on deposit under section 5 are likely to be required to remediate the property. The amount in escrow shall not exceed the likely costs of remediation if the property were used for its highest and best use. This subsection does not limit or expand an owner's or agency's rights to bring federal or state cost recovery claims.

(3) Notwithstanding any order entered by the court requiring money deposited pursuant to section 5 to remain in escrow for the payment of estimated remediation costs of contaminated property, the funds in escrow, plus interest subject to section 15, shall be released among the claimants to the just compensation under circumstances that the court considers just, including any of the following circumstances:

(a) The court finds that the applicable statutory requirements for remediation have changed and the amount remaining in escrow is no longer required in full or in part to remediate the alleged environmental contamination.

(b) The court finds that the anticipated need for the remediation of the alleged environmental contamination is not required or is not required to the extent of the funds remaining on deposit.

(c) If the remediation of the property is not initiated by the agency within 2 years of surrender of possession pursuant to section 9 and the agency is unable to show good cause for delay.

(d) The costs actually expended for remediation are less than the estimated costs of remediation or less than the amount of money remaining in escrow.

(e) A court issues an order of apportionment of remediation responsibility.

should be instructed to determine the fair market value of the property at the time of the taking not only with reference to the use to which it was then applied, but also with reference to the uses to which it was reasonably adapted.

In *City of St. Clair Shores v Conley,* 350 Mich 458, 462; 86 NW2d 271 the Court ruled that the property owner is "entitled to an award based upon the highest and best use of her land; and the jury was entitled to consider every legitimate use."

This Court recently addressed what may be considered in arriving at just compensation. In *Dep't of Transportation v VanElslander*, 460 Mich 127; 594 NW2d 841 (1999) this Court adopted as its own, the dissenting opinion of Judge Bandstra in Docket No. 183321. This Court held that just compensation is: (1) the full monetary equivalent of the property taken; (2) intended to make the owner whole; (3) without enriching either the owner or the public at the expense of the other; and (4) generally left for determination by the trier of fact upon consideration of the evidence:

> Both the federal and state constitutions provide that private property cannot be taken for public use without just compensation. Just compensation means the full monetary equivalent of the property taken.
>
> * * *
>
> The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense. There is no formula or artificial measure of damages applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented. [*K & K Construction, Inc v Dep't of Natural Resources*, 217 Mich App 56, 72-73; 551 NW2d 413 (1996)[3] (citations omitted).][4]

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[4] The principles set forth in that quotation are based upon numerous decisions of this court, e.g. *In re Widening of Bagley Ave*, 248 Mich 1, 5; 226 NW 688 (1929) (put the owner in as good a position as before the taking) *In re State Hwy Comm'r*, 249 Mich. 530, 535; 229 N.W. 500 (1930) (Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual.) *In re Civic Center*, 335 Mich 528; 56 NW2d 375 (1953) (The jury is to hear the testimony and make the final determination that is not subject to reversal if it is within the range of the evidence.)

[3]Reversed on other grounds 456 Mich 570, 575 NW2d 531 (1998). [460 Mich at 120-130]

Whether any particular evidence is admissible was held to depend upon its relevance, described as:

> Relevance is the threshold of admissibility. MRE 402. Evidence is relevant if it "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Yates v Keane,* 184 Mich App 80, 82; 457 NW2d 693 (1990). [460 Mich at 129]

In view of those principles this Court concluded that evidence that affects value is relevant:

> Thus, any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant.[5] [460 Mich at 130]

It then becomes the responsibility of the fact-finder, to weigh the relevant evidence:

> These are considerations to be weighed by the fact-finder in determining "the price which a willing buyer would have offered for the property just prior to the taking." [460 Mich at pp 130-131]

It appears that the trial court, sitting as the fact-finder, did just that in the instant case.

Whether contamination affects the value of any particular parcel of property presents a question of fact. But, if the evidence shows that it affects fair market value, that evidence is relevant and may be considered in determining just compensation.

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[5] There is no indication that that broad statement was intended to overrule longstanding principles of eminent domain law excluding the consideration of certain factors, such as "circuity of travel" *Biff's Grills, Inc v State Highway Comm*, 75 Mich App 154; 254 NW2d 824 (1977) or "diversion of traffic" *State Highway Comm'r v Gulf Oil Corp*, 377 Mich 309; 149 NW2d 500 (1966) and *State Highway Comm'r v Watt*, 374 Mich 300; 132 NW2d 113 (1965). Nor was it intended to address the statutory limitations, e.g. on considering "general project effects" described in section 20(2) of the UCPA, MCL 213. 70. See *Spiek v Michigan Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

F. The effect of contamination on fair market value varies with the circumstance.

The fair market value of property depends on many variables; prominent among them is the condition of the property and its suitability for use. A prospective purchaser of a house may notice that the roof is in extremely poor condition. The amount that the purchaser would be willing to pay for that house would necessarily account for the need to replace the roof, and the cost of that repair. Assessing the market effect of contamination is like assessing the effect of a poor roof, just far more complicated.

No one could seriously argue that the only way to account for contamination is to deduct the estimated cost of cleanup. The estimated cleanup costs are relevant, in appropriate cases, only as an element that a reasonably prudent buyer and seller would take into account. Just how the existence of contamination will affect value will vary from one circumstance to another. It is likely that there will be disputed factual issues regarding such things as: (1) whether any cleanup is necessary, (2) the type of cleanup needed, (3) the cost of the cleanup, (4) when the cleanup will be needed, (5) the availability of governmental funding to pay some or all of the costs, (6) the availability of governmental waivers or special programs to facilitate economic development (brownfields legislation), etc. In a particular case, like the instant one, findings may be made that the property must be remediated to a certain extent to be made useful for any purpose, so that any purchaser would at least deduct the estimated remediation costs to establish the value of the property.

The critical point in considering the effect of contamination on value is to assess what constitutes the highest and best use of the property, given that at least some potential uses will require more or less remediation of the property. For example, it may

be that a particular parcel could be sold for its current use, without the necessity for remediation. While the property might be worth much more if it could be developed for other uses, the cost of remediation to allow those other uses may exceed the appreciation in value. In such a circumstance, the highest and best use would be the current use. Whatever value the property would have for its current use would take into account the fact that no remediation is necessary for that use, but that future alternative uses would require remediation. That value could not be further reduced in a condemnation case to reflect the need of a public agency to remediate the property. To allow the value to be reduced in that circumstance would be to pay less than fair market value for the highest and best use of the property. Determining the "highest and best use" requires evaluating various degrees of cleanup for various potential uses, to arrive at the use – and level of cleanup – that produces the net highest value. Those conclusions result from the principle that: "Just compensation means the full monetary equivalent to the property taken." *VanElslander, supra*, at 128. The agency may be free to pursue a separate cost recovery case against whomever may be liable, but it could not seek a reduction in the just compensation to account for the, otherwise unnecessary, costs of remediation.

The Court of Appeals seemed to be unaware of those principles of eminent domain law and their application to contaminated property. The Court apparently assumed that, if environmental contamination were taken into account, a public agency could pay less than the fair market value of the property, at its highest and best use:

> Determining fair market value of a contaminated property is not as simple as deducting the estimated costs of remediation. The cost of cleanup relates in large part to the extent of the contamination and the future use of the property. The cost to make the property suitable for service as a storm water detention pond may exponentially exceed the cost of cleanup to use the property for other purposes. This fact is recognized in the UCPA, which pursuant to section 8 only allows the

> court the authority to hold in escrow the "likely costs of remediation if the property were used for its highest and best use." MCL 213.58(2); MSA 8.265(8)(2), as amended by 1996 PA 474; MCL 213.58(1); MSA 8.265(8)(1), as amended by 1993 PA 308. Thus, it is clear that the only proper method of arriving at just compensation is to separate the question of just compensation from the question of liability for environmental cleanup. [245 Mich App at 567-568]

If the cost to remediate for a storm water detention pond "exponentially exceed[s] the cost of cleanup to use the property for other purposes," then that cost would probably not be consistent with the highest and best use and would not be used to determine just compensation (as it was not in the instant case). If the property was not assigned its highest and best use, appellate relief should be granted. But this concern does not require the categorical exclusion of relevant evidence.

Apparently the Drain District actually expended over $2,000,000 for remediation, while only $237,768 was deducted to arrive at just compensation. But, even if $237,768 approximated what the District expended for remediation, that would not mean that the condemnation case had been used as a substitute for cost recovery. Deducting estimated remediation costs to arrive at just compensation is not erroneous, if the methodology is sound. If an assessment of the highest and best use of the property concludes that remediation is unavoidable – and if the nature of the remediation is consistent with the assessment of the highest and best use – then deducting the estimated remediation is simply the calculation of the fair market value of the property.

One can question whether contamination was properly factored into a determination of just compensation in a given case, but neither logic nor law supports a conclusion that the contamination must be ignored.

G. Difficulties of proof do not bar consideration of contamination.

As noted above, the Court of Appeals expressed its opinion that the existence of contamination is, in effect, irrelevant to the value of property, or it is too difficult to quantify:

> The mere fact that a property is contaminated provides no significant assistance in determining its fair market value. While the fear of liability arising from environmental contamination may render a property non-transferable, it certainly does not render it valueless. Contaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value. [245 Mich App at 567]

While the mere fact of contamination may be of little assistance, evidence on the impact of that contamination on the uses to which the property may be put, the necessity to remediate it, the cost of doing so, and how the marketplace would assess those factors, are of enormous assistance in determining fair market value. With regard to the difficulty of finding sales of comparable properties upon which to base an estimation of value, that is a difficulty that differs only in degree from the difficulty that exists in valuing any property that has unique characteristics or uses. Such difficulties are commonplace in the condemnation of property.

In re Grand Haven Highway, 357 Mich 20, 27-28; 97 NW2d 748 (1959) addressed the fact that property cannot always be conveniently valued by reference to sales of comparable property, noting that this difficulty of proof is surmountable in the quest to determine just compensation. The Court quoted 18 Am Jur, Eminent Domain, § 247, p 885:

> While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under ordinary

> conditions he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the 'value in use' to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value. [emphasis added]

Certainly arriving at a value for contaminated property cannot be more difficult than arriving at the value of a cemetery. As this Court stated, it is simply necessary to consider "the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it."

Valuing factors that are difficult to quantify was addressed in regard to a possible zoning change in *State Highway Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). This court stated:

> The determination of value in each case, we have also held, is not a matter of formula or artificial rule but of sound judgment and discretion based upon the relevant facts in the particular case. [footnote omitted]

At issue in the *Eilender* case was whether, and how, to account for the possibility that property being condemned could be rezoned to a higher and better use, and, therefore, would have a higher fair market value than would be indicated by current zoning. Echoing the Court of Appeals below, it could be said that such properties "are like snow flakes; no two are alike." The uncertainty associated with valuing a mere possibility of rezoning makes the determination of just compensation very difficult. The experts and the jury would have to assess the unique circumstances, prior action on similar rezoning requests, community history regarding development, etc. to judge the likelihood that

rezoning would be granted, and then it would be necessary to place a value on that possibility. Notwithstanding the difficulty of the task, this court ruled:

> Here 1 of the relevant facts pertained to an already-pending modification of the zoning. This is not to say that speculative future uses incompatible with existing zoning are to be assigned a valuation. We look at the value of the condemned land at the time of the taking, not as of some future date. If the land is then zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation.
>
> But, on the other hand, it has been held, "if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered in arriving at the proper value. This element, too, must be considered in terms of the extent to which the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking." [362 Mich at p 699 (emphasis added) (footnotes omitted)]

More recently this court applied that same principle to a possibility of obtaining a zoning variance, to mitigate the adverse effects of a partial taking. In *Dep't of Transportation v VanElslander*, *supra*, this court decided that where a partial taking left the remaining property in non-conformity with a zoning ordinance, the possibility that a variance could be obtained must be considered in determining just compensation:

> Thus, any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant. This includes evidence of the possibility of rezoning to the extent that "the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking." *State Hwy Comm'r v Eilender,* 362 Mich 697, 699; 108 NW2d 755 (1961). [460 Mich at 129-130]

This court recognized that those possibilities are not subject to precise measure, being subject to various contingencies. But neither a property owner nor an agency is to be given an unjust benefit because of that difficulty. The fact-finder is to sort out all the relevant evidence to arrive at the fair market value of the property:

> Both the possibility of rezoning and the possibility of a variance are subject to vicissitudes. A variance may, as plaintiff argues, be easier to

> obtain than a rezoning, while a variance granted may be revoked in the future, as pointed out by defendants. These are considerations to be weighed by the factfinder in determining "the price which a willing buyer would have offered for the property just prior to the taking" under *Eilender* regardless of whether the possibility of rezoning or the possibility of a variance is at issue. There is no reason to apply *Eilender* only to benefit property owners seeking to increase compensation; it is equally available to governmental entities seeking to assure that compensation is just. "Just compensation ... should neither enrich the individual at the expense of the public nor the public at the expense of the individual." [460 Mich at 130-131 (emphasis added)]

Similarly, it is the responsibility of the parties in a condemnation case to adduce evidence that will enable the fact-finder to arrive at the value of the property, taking into consideration that the property has been contaminated by the release of hazardous materials. The difficulty of the task is no reason to ignore the matter.

H. Decisions in foreign jurisdictions do not justify excluding the evidence.

Citing decisions in foreign jurisdictions, the Court of Appeals stated that "by deducting estimated cleanup costs from a parcel's value in determining just compensation for a taking, a court circumvents any defense a landowner might have to liability for such costs," adding "the inequity of deducting such costs before any determination of the landowner's liability is clear." [245 Mich App at 566] The Court relied on three cases.

In *WR Associates of Norfolk v Comm of Transportation*, 46 Conn Supp 355; 751 A2d 859 (1999) the court considered a case in which barrels "containing quantities of environmentally sensitive chemicals" were found on property being condemned. The state environmental protection agency stepped in and the owner agreed to pay the remediation costs associated with those barrels. In the following construction season additional contamination was encountered and the condemnor sought to factor that condition into the valuation of the property being condemned. Citing an earlier

Connecticut decision, *Murphy v Waterford*, No. 521073, 1992 WL 170588 (Conn Super Ct July 9, 1992), the court stated:

> If cleanup costs were factored into the amount of compensation, the condemnor would benefit from double recovery. The owner would in effect pay for the cost of cleanup by receiving less money for the condemned property and pay again as a result of any judgment against him. The equitable nature of the condemnation proceeding precludes a double payment. [751 A2d at 865]

Amicus Michigan Department of Transportation agrees that a double recovery should not be permitted, but that result can be avoided. The condemnation judgment can specify the amount of the deduction attributable to contamination (as the trial court did in the instant case). That judgment may be used by the owner in any subsequent lawsuit to allocate responsibility for remediation costs. The equitable nature of response cost allocation should enable the owner to avoid any double recovery.

The Court of Appeals also cited an appellate ruling from Illinois, *Dep't of Transportation v Parr,* 259 Ill App 3d 602; 633 NE2d 19 (1994). Answering a question certified to it, the court ruled that the Illinois Department of Transportation (IDOT) could not introduce "alleged environmental remediation costs at eminent domain proceedings in determining the fair market value." (633 NW3d at 20). The facts were briefly described:

> In early 1990, IDOT informed the Parrs that the construction of the Robert H. Michel bridge necessitated the condemnation of their property. At that time, IDOT informed the Parrs that they owed IDOT over $100,000 for the property's environmental remediation costs.
>
> * * *
>
> At the quick-take bench trial, IDOT presented evidence appraising the property's value at zero due to the alleged presence of environmental hazards on the property and the costs of removing the hazards. [633 NE2d at 20]

As that quotation reveals, IDOT determined that the property had zero value and was attempting to establish *in personam* liability - to have the property owner pay to it

"$100,000 for the property's environmental remediation costs." Unlike the instant case, the *Parr* case represents an attempt to transform a condemnation case into a cost recovery case. In any event, the Illinois court ruled that a provision of the state's Eminent Domain Act would not allow the admission of evidence of remediation costs, under the facts of the case:

> According to section 7-119, the costs to remedy a condition on condemned property cannot be admitted without proof before the trial court of an illegal condition. In the absence of such proof in this case, we conclude that section 7-119 of the Eminent Domain Act does not authorize the admission of environmental remediation costs in eminent domain proceedings. [633 NE2d at 22]

Michigan has no such statute, and in fact, as this brief will later address, the UCPA allows the consideration of contamination. The Court went on to rule that the evidence would be inadmissible, even if it were not barred by that statute, because it would deprive the owner of the defenses that would be available in a cost recovery suit:

> We also find that even if environmental remediation costs were admissible under section 7-119, such admission would violate the procedural due process rights of the owners of condemned property. We determine that the costs' admission in a condemnation proceeding without the procedural safeguards provided in the Environmental Protection Act would permit IDOT to circumvent the procedures established by the legislature and the Environmental Protection Agency for recovering environmental remediation costs. We conclude that IDOT's proposed circumvention of established procedure deprives property owners of their rights and defenses under the Environmental Protection Act. [633 NE2d at 22]

That ruling makes sense if the condemnation case is being used as an *in personam* proceeding to recover money from the property owner. But, the *Parr* case has no relevance to the instant one.

Finally, the Court of Appeals cited *Alladin, Inc v Black Hawk Co*, 562 NW2d 608 (Iowa, 1997) in support of the exclusion of cost of remediation evidence [245 Mich App at 567] The *Alladin* court expressed concern that before being held liable for the

costs of contamination an owner should have the rights and defenses available in a cost recovery action:

> A property owner has a right to have its liability established in a legal proceeding in which the owner has the opportunity to show that the owner did not cause the water pollution or hazardous condition. [562 NW2d at 615]

The invalidity of this point has already been addressed. In a condemnation case, the owner is entitled to recover fair market value – no more, and no less.

Interestingly the *Alladin* court also noted that its ruling was contrary to decisions in several other jurisdictions:

> We are mindful that other jurisdictions have allowed evidence of contamination and the cost of cleanup to be admitted in an eminent domain proceeding. See *Redevelopment Agency v Thrifty Oil Co*, 4 Cal App 4th 469, 5 Cal Rptr 2d 687, 689 (1992) (remediation issue was properly considered where city took possession of gas station property and spent $182,000 to treat gasoline contamination); *Finkelstein v Department of Transp*, 656 So2d 921, 925 (Fla 1995) (where owner is entitled to reimbursement of remediation costs, the condemned property should be valued as if the contamination cleanup had been completed, but testimony about contamination "stigma" and its effect on value is allowed); *Stafford v Bryan County Bd of Educ*, 219 Ga App. 750, 466 SE2d 637, 640 (1995) (the general environmental condition of the condemned property was a relevant factor in fairly assessing the market value); *City of Olathe v Stott*, 253 Kan 687, 861 P2d 1287, 1289 (1993) (Kansas Storage Tank Act does not preempt general statutes regarding eminent domain; thus, evidence of contamination is admissible in an eminent domain proceeding involving a determination of the fair market value of property taken); *State v Brandon*, 898 SW2d 224, 227 (Tenn App 1994) (evidence of contamination and cost of reasonable steps to remedy the contamination is admissible and relevant to issue of fair market value). [562 NW2d at 616-617]

As that above quotation makes apparent, most of the states that have addressed the subject allow consideration of the contamination. And, none of the foreign decisions cited by the Court of Appeals justify a failure to follow settled principles for determining

just compensation or a failure to implement the legislative intent evident in the provisions of the UCPA.

I. Considering the existence of contamination in determining just compensation is equitable.

The Court of Appeals, and some of the cited foreign decisions, indicated that a property owner should not bear the financial consequences associated with selling property that is contaminated, because that would not be equitable. It was asserted that the property owner should not be without the defenses that would be available in a cost recovery action. [245 Mich App at 566] But, those cases failed to examine the differences in the nature and purpose of environmental cost recovery actions and condemnation proceedings – and failed to consider the consequences of disregarding the existence of contamination. When those factors are considered it becomes apparent that it would be inequitable to determine just compensation without considering the effect any existing contamination has on the fair market value of that property.

The central issues in a cost recovery action concern the cost of remediating the property and the determination of *in personam* liability for the payment of those costs; the value of the property is not a central issue.

In contrast, as explained above, the central purpose of a condemnation proceeding is to determine the fair market value of property. Under Const 1963, art 10 § 2, that determination is typically made by a jury, with the judge later determining how to apportion the jury award among the competing claimants. See §13 of the UCPA, MCL 213. 63. It is not the function of a condemnation proceeding to assign liability for the costs of remediating environmental contamination. Accordingly, the defenses that a property owner may have to liability for contamination are not relevant in a

condemnation case. Whether the owner has any such defenses has no effect on the fair market value of the property. Being "denied" those defenses in the condemnation proceeding is no more than the logical consequence of the difference between condemnation proceedings and cost recovery actions.

Two examples will illustrate why it is equitable that the existence of contamination be considered in arriving at just compensation.

A contaminated parcel might have sold for $100,000, though its value would have been $400,000, were it not contaminated. Sometime later that parcel might be condemned for a public purpose. Putting aside appreciation in value over the intervening passage of time, the Court of Appeals would require the public agency to pay $400,000 – under the notion that the agency can always file a cost recovery case for the remediation costs it will incur to make the property usable, and therefore worth $400,000. The condemnee, who received the $300,000 windfall, could assert an "innocent purchaser" defense to a cost recovery action, preventing the agency from recovering any part of that overpayment. The persons who are actually liable for the remediation costs under environmental statutes may no longer exist or may be uncollectible. That would leave the public with a $300,000 loss and the condemnee with a $300,000 windfall. Not only is such a result inequitable, it is violative of the settled principle:

> Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual. *Wayne County v William G. Britton and Virginia M. Britton Trust*, 454 Mich 608, 621; 563 NW2d 674 (1997) reh den'd, 456 Mich 1201, 568 NW2d 671 (1997) quoting *In re State Highway Comm'r*, 249 Mich 530, 535; 229 NW 500 (1930).

Another example revolves around the requirement that, in a condemnation case, property must be valued according to its highest and best use, unrestricted by its actual

current use. See *Wayne County Board of Road Comm'rs v GLS Leasco, supra* and *City of St. Clair Shores, supra.*

A particular parcel might be contaminated, but its owner might be using it as a parking lot, with no necessity to clean up the contamination. When it acquired the property the owner might have paid a price that reflects its value as a parking lot. Later a public agency might condemn a portion of the parking lot. The property owner might contend that the highest and best use of the property would be as a site for an office building, a use that would increase the value it has as a parking lot, fivefold. But, concomitant with the excavation needed to construct an office building, the property may need to be remediated at a cost that would exceed the fivefold increase in property value. In that example, the value of the property in the marketplace would be based on its use as a parking lot, not its potential – but cost prohibitive – use for an office building. If the existence of the contamination could not be taken into account to arrive at the fair market value of the property, the public might be required to pay, as "just compensation," five times the fair market value of the property. As in the previous example, the public might, or might not, be able to recoup some of that overpayment in a subsequent cost recovery action – and the owner might have defenses so that it could escape any liability whatsoever. Depending on the circumstances, the owner may be able to retain the full windfall payment.

It is readily apparent that if the public is required to pay for contaminated property based on the fiction of what the property would be worth were it not contaminated, owners of those properties will be unjustly enriched at the expense of the public. Both of the above examples illustrate why it is entirely equitable to consider the existence of

contamination to determine the fair market value of the property and to render the just compensation award.

J. The UCPA allows contamination to be reflected in appraised value.

The Court of Appeals purported to base its decision on the amendments to §§ 5 and 8 of the UCPA made by 1993 PA 307:

> We conclude the UCPA does not vest courts with the authority to account for estimated remediation costs of contaminated property when calculating the amount of just compensation due a property owner. This conclusion is premised on the plain language of the amendments to the UCPA. The amendment to section 5 requires the condemning agency to either waive or reserve its "rights to bring federal or state cost recovery actions . . . ." The amendment to section 8 vests the court with the authority to protect the condemning agency should it prevail in a cost recovery action by allowing "any portion of the money deposited . . . to remain in escrow as security . . . ." This language supports the conclusion that any form of cost recovery arising from environmental contamination is to be pursued in a separate cause of action. There would be no purpose to these amendments if a court, in the process of determining just compensation, could simply deduct remediation costs from the fair market value of the condemned property.
>
> The error in deducting environmental cleanup costs when determining just compensation is evident given that the amendments to the UCPA direct that liability for such costs be determined by way of a separate cause of action. The UCPA simply does not provide a basis for recovering remediation costs. [245 Mich App at 565]
>
> * * *
>
> Thus, it is clear that the only proper method of arriving at just compensation is to separate the question of just compensation from the question of liability for environmental cleanup. [245 Mich App at 568]

The Court misunderstood the purposes of §§ 5 and 8 and failed to consider other relevant provisions of the UCPA.

In requiring that a good faith offer reserve or waive the right to pursue environmental response costs, § 5 (1) of the UCPA expressly states that the agency's appraisal of just compensation shall reflect the reservation or waiver:

> The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present

> owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver. [emphasis added]

The purpose of an appraisal is to determine the value of property.[6] The only way that the agency's appraisal could "reflect such reservation or waiver" is if the election might influence the dollar amount of the appraisal. A couple of examples illustrate the point.

If the agency reserves its rights, the property might be appraised as if it were not contaminated, leaving the financial consequences of any needed remediation to be addressed in a future cost recovery action. The appraisal would indicate that the property was valued without any consideration of the contamination. The agency might ask the court to escrow some or all of the just compensation as security for a separate cost recovery action.

If the agency waives its rights, it might appraise the property as contaminated, and the appraisal reports would so indicate. The effect would be reflected in the dollar value of the property and, in some cases, in the highest and best use of the property for valuation purposes.

So long as precautions are taken to assure that there is no risk of the agency obtaining, in effect, a double recovery for the contamination, it is possible for the contamination to be a valuation issue in both a condemnation case and a later cost

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[6] Section 1(d) of the UCPA, MCL 213.51 provides:

> Sec. 1 As used in this act:
> (d) "Appraisal" means an expert opinion of the value of property taken or damaged, or other expert opinion pertaining to the amount of just compensation.

Section 11(2) of the UCPA, MCL 213.61 provides:

> Sec. 11 (2) An appraisal report provided pursuant to this section shall fairly and reasonably describe the methodology and basis for the amount of the appraisal.

recovery action. For example, this might occur if the cost of remediation far exceeded the value of the property and the condemnee was liable for remediation costs under applicable environmental laws. The permutations of this subject need not be explored in the instant case. Suffice it to say that there are a variety of ways in which an appraisal could "reflect" the agency's waiver or reservation of its rights, but they all relate to the appraised value of the property.

Further evidence that the Legislature did not intend to prohibit consideration of cleanup costs is found in § 6a of the UCPA, MCL 213.56a. That section allows a court to compel an agency to reverse its reservation of rights, and waive the right to cost recovery, for three categories of property. The statutory language governing such compelled waiver of rights simply cannot coexist with the legislative intent imputed by the Court of Appeals. Subsections (1)(c) and (2) confirm that point:

> Sec. 6a. (1) If an agency elects to reserve its rights to bring a state or federal cost recovery claim against an owner, the court upon motion of the owner, which must be filed within the time prescribed to responsively plead after service of a complaint, may reverse that election and order the agency to waive its claims, if the owner establishes by affidavit, and after an evidentiary hearing if requested by the agency in the time prescribed to provide an answer to a motion, 1 or more of the following circumstances exist with respect to the property:
>
> (c) The owner is the only identified potentially responsible party, the extent of contamination and cost of remediation has been reasonably quantified, and the estimated cost of remediation does not exceed the agency's appraised value of the property.
>
> (2) If the court reverses the agency's election of reservation of rights under subsection (1), the agency shall submit to the owner a revised good faith offer. The revised good faith offer shall be considered the good faith offer for purposes of sections 5 and 16. [MCL 213.56a (emphasis added)]

This language supports only one construction of the Legislature's intent in that circumstance. Since to qualify for the court-ordered waiver, the owner must be the only

party potentially liable for the cleanup costs, the amount of the costs must be known, and the cleanup costs must not exceed the appraised value, the legislature must have contemplated that the agency could, in effect, recover those cleanup costs – at least insofar as they would diminish fair market value – by paying less for the property by way of just compensation. Any other construction would render the criteria for the subsection (c), exception meaningless and arbitrary. Any other construction would have to disregard subsection (2) that requires the agency to revise its good faith offer, when the court compels the agency to reverse its election and waive its rights to pursue cost recovery.

If the Court of Appeals decision is correct and the contamination or cleanup costs may not be considered in condemnation proceedings, what would be the purpose of revising the good faith offer? The only plausible meaning of § 6a (2) is that the Legislature expected that the agency might reduce its appraised value to take into account the contamination, the estimated cleanup costs, and the fact that the agency would have no recourse against the condemnee.

Section 8 (4) of the UCPA, MCL 213.58, also clearly allows for a reduced appraisal:

> (4) If the court orders the agency to reverse its election under section 6a(1), the court shall order the escrowee to pay the amount of the revised good faith written offer for or on account of the just compensation that may be awarded pursuant to section 13, and to pay the balance of the escrow to the agency. [emphasis added]

Under § 5(5) of the UCPA, the escrow account represents the estimated just compensation (this is not the § 8(2) escrow account held as security). Section 8(4) plainly contemplates that, when forced to waive its rights, the agency may reduce its

estimated just compensation, thereby leaving a "balance" in the escrow account to be returned to the agency.

The amendments made to the UCPA by 1993 PA 307, made it clear that the right to seek cost recovery could be exercised by a condemnor, just as it could be exercised by a private purchaser. The amendments also allowed an agency to reflect the contamination in its appraisal and good faith offer.

Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Robinson v City of Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000) To construe the UCPA as evincing a legislative intent to exclude consideration of contamination or the costs of cleanup in a condemnation case simply ignores the statute's language read as a whole. The Court of Appeals clearly erred.

CONCLUSION

The impact of the contamination or estimated cleanup costs on market value will vary from one property to another depending on a myriad of factors. It is the responsibility of the parties to adduce the evidence necessary to aid the fact-finder, given the circumstances of each specific case. It is then the responsibility of the fact-finder to weigh all the evidence and render an award that reflects the fair market value of the property. The existence of contamination is just one of many variables that may have to be assessed. There is nothing about this particular variable that could justify excluding any consideration of it, in disregard of settled principles of eminent domain law and the provisions of the UCPA.

RELIEF

Amicus curiae, the Michigan Department of Transportation, asks that this Honorable Court reverse the decision of the Court of Appeals, and rule that the existence of contamination and the estimated cleanup costs may be considered in determining just compensation in a condemnation case, insofar as the evidence demonstrates the effect of those considerations on the fair market value of the property.

Respectfully submitted,

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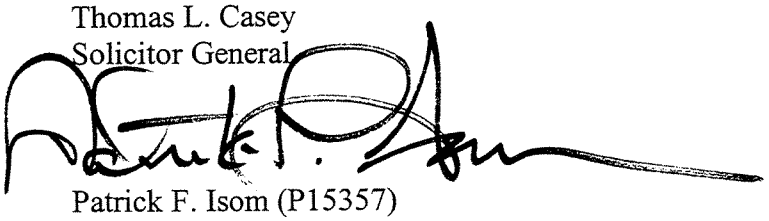

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